

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 360 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? No
  2. To be referred to the Reporter or not? Yes
  3. Whether Their Lordships wish to see the fair copy of the judgement? No
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
  5. Whether it is to be circulated to the Civil Judge? No

-----  
SOMNATH MULJIBHAI NAYAK

Versus

VASANTIBEN PRAHLADJI NAYAK

-----  
Appearance:

MR KV SHELAT for Petitioners

MR DUSHYANT A DAVE for Respondent No. 1, 2, 3, 4

-----  
CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 28/04/98

J U D G E M E N T

This is defendants' Second Appeal.

2. The plaintiffs - respondents filed a Suit for declaration that they are owner of the land in dispute

and for recovery of possession of the same from defendants and also for permanent injunction restraining the defendants from interfering with their possession over the disputed land. Four houses were owned by the husband of the plaintiff No.1. He died about 1-1/2 years before. The houses fell down and only site of the house was available. Plaintiffs claimed that the said property was in possession of the husband of the plaintiff No.1 and after his death all the plaintiffs, being heirs of the deceased, came in possession of the suit property. The defendants and some other persons of Nayak community tried to persuade the plaintiffs to donate the land for the use of the community, but due to weak financial conditions they could not do so. The defendants then tried to bring undue pressure on them and taking advantage of the fact that the plaintiffs were residing at Ahmedabad, the defendants started constructing wall on the eastern and northern boundary of the land in suit. Accordingly, Suit for declaration, possession and injunction was filed.

3. The Suit was contested on the ground that it is barred by limitation, adverse possession and non-joinder of necessary parties, and also for non-compliance of order :1, Rule : 8 C.P.C. The defendants also asserted their possession over the land in suit for more than 20 years and also asserted acquisition of title by adverse possession.

4. The trial Court dismissed the Suit. An Appeal was filed which was allowed and the Suit of the plaintiffs was decreed. They were declared to be owners of the disputed property. The decree for recovery of possession and mesne profit in respect of 40 ft. by 30 ft. land was passed against the defendants. The defendants were restrained from interfering with plaintiff's possession over the disputed land. Accordingly, Second Appeal was filed by the defendants.

5. Following substantial questions of law were formulated in this Second Appeal :

(1) Whether lower appellate Court could have passed the decree for possession after reversing the finding recorded by the learned trial Judge that identity of property in terms of documents of title was not established by the plaintiff without deciding the issues as to limitation and adverse possession ?

(2) Alternatively whether the lower appellate court

could not have remanded the Suit to the trial Court for deciding the issues Nos.2, 4 and 5 which had remained undecided ?

6. The Appeal came up for hearing before this Court.

By order dated 22.1.1997 this Court observed that the trial Court as well as the first Appellate Court did not decide Issue Nos.2, 4 & 5. It was further observed that it was not a case of accidental omission rather the trial Court did not consider it necessary to decide these issues and the lower Appellate Court did not apply its mind to the fact that these issues were not decided. Hence, these issues were remanded (it should have been remitted) to the lower Appellate Court for decision on Issues No. 2, 4 & 5 on the evidence already on record.

Issue No.2 was regarding bar of limitation. Issue No.4 was regarding possession of Nayak community over the disputed land since more than 20 years and Issue No.5 was on bar of adverse possession.

7. The lower Appellate Court on these remitted issues held that the Suit was barred by limitation and the Nayak community was in possession over the land in suit for more than 20 years and that the defendants - appellants acquired title over the land in suit by adverse possession.

8. Opportunity was given by me to the respondent to file objections against the finding on remitted issues. Accordingly objections were filed.

9. Learned Counsel for the parties were heard at length. Learned Counsel for the appellant contended that since the lower Appellate Court has returned finding in favour of the appellant that the Suit is barred by limitation, and adverse possession, Appeal deserves to be allowed and the Judgment and Decree of the lower Appellate Court should be set aside. He further argued that since the lower Appellate Court found that the appellants are in possession over the Suit land since more than 20 years this is also a ground for dismissing the suit of the plaintiffs respondents and for allowing this Second Appeal.

10. The learned Counsel for the respondents, on the other hand, contended that the findings of the lower Appellate Court on the three remitted issues are erroneous and the Second Appeal deserves to be dismissed.

11. So far as objections regarding non-compliance of

Order : 1, Rule : 8 C.P.C. was concerned, it was rightly repelled by the Courts below with the observation that requisite permission under Order : 1, Rule : 8 C.P.C. was obtained by the plaintiffs - respondents. The question for consideration is whether the Suit is barred by limitation. If the finding of the lower Appellate Court on this issue is accepted then it is not necessary to enter into other controversy because the Law of Limitation bars the remedy, but not the right. Even if the plaintiffs - respondents are held to be owners of the disputed land they can not get any relief from the Civil Court because of bar of limitation.

12. Learned Counsel for the respondent contended that the lower Appellate Court was in error in presuming that it was a case under the old Article 142 of the Old Limitation Act. According to him the case is governed by Article 65 of the New Limitation Act and as such even if the plaintiffs failed to establish their possession over the land in Suit they could not be non-suited because they filed Suit on the ground of title. The title was derived from the husband of the plaintiff No.1. It was said to be a joint family property. There was subsequent partition on 29.11.1965 in which the disputed property, according to the respondents, fell in their share. The partition Deed was filed. Other documents were also filed. It was thus argued that in the case based on title the Suit even for possession or declaration of title could not be dismissed simply on the ground that the plaintiffs were not in possession of the property within a period of 12 years. Reliance was placed on the case of Indira V/s. Aru Mugam & anr., reported in (1998) 1 SCC 614. The Supreme Court in this case held that in a Suit for possession of immovable property based on title initial burden is on the plaintiff to prove his title. Once the title is established on the basis of relevant document and other evidence, unless the defendant proved adverse possession for prescriptive period, the plaintiff cannot be non-suited. It was further held that under Article 142 of the Old Limitation Act the plaintiff had to prove, not only title, but also possession within 12 years on the date of the Suit. This position has since changed under Article 65 of the New Limitation Act.

13. In this case the bar of limitation has relevance to the defendants plea of adverse possession and also long possession extending 20 years. These three questions, therefore, have to be considered together and not in isolation.

14. Under Article 65 of the Limitation Act the Suit

for possession of immovable property or any interest therein based on title can be filed within 12 years when the possession of the defendant becomes adverse to the plaintiff. This provision was considered by the Apex Court in Indira's case (Supra) and it was observed that the plaintiff to base his case on title had to prove not only title, but also possession within 12 years of the date of the Suit as was available under Article 142 of the earlier Limitation Act and the said provision of law has undergone a metamorphic change as has been found under the Limitation Act, 1963, Article 65.

15. The next question would be as to when the period of limitation will begin to run and when adverse possession of the defendants alleged by them became adverse to the plaintiffs. The learned Counsel for the respondents, in this connection, contended that the material date for calculating limitation and adverse possession would be the date of partition, viz. 29.11.1965 and not earlier. It was on this date that registered Partition Deed came into existence. However, it is the case of the respondents that the property was owned by the husband of plaintiff No.1 and father of the remaining plaintiffs. Upon his death the property devolved upon the plaintiffs and then there was partition whereafter plaintiffs became entitled to separate share in the joint property. The learned Counsel for the respondent relied upon a case of Krishanlal V/s. Vidyacharan, reported in 1995 (4) SCC (suppl.) 487. This case, to my mind, is distinguishing on facts. In this case property was transferred by rehabilitating department. Deed of conveyance was executed conferring ownership of transferee from an earlier date mentioned in the Deed. Adverse possession was calculated from the date of execution of the Deed and not from the date mentioned in the Deed itself. Thus, the facts here are all together different. It was only through the Deed of Conveyance that ownership rights were transferred to transferee and it was rightly held that the adverse possession is to be calculated from the date of execution of the Deed of transfer.

16. In the case before me the Deed of Partition did not confer title to the plaintiffs. On the other hand it simply separated the share of the plaintiffs in the joint family property. In a joint family property as alleged by the plaintiffs every co-sharer will have share according to personal law and other co-sharers will be deemed to be in possession of the joint property. The question of possession over a specific share of the co-sharer will arise only when the property is divided by metes and

bounds. As such the respondents cannot be heard to say that they became owners of the property only on 29.11.1965 when the Partition Deed was executed. They asserted their possession and also possession of their husband and father respectively even prior to his death. Consequently the starting point of limitation or starting point for calculation of limitation and adverse possession can not and should not be 29.11.1965.

17. There is categorical finding of the lower Appellate Court based upon appreciation of evidence on record that the appellants are in possession of the property for more than 20 years. It was observed from the documents on record that the possession of the respondent is established since 1934 and in any case since 1941 onwards. The revenue records are no evidence of title, but certainly these documents furnish evidence on the question of possession. These documents were rightly considered by the lower Appellate Court which observed that the possession of the defendants appellants for more than 20 years was established. If the taxes were paid by the plaintiffs - respondents after the alleged partition that would not oust the appellants from actual possession. It is in evidence that the plaintiffs resides at Ahmedabad. Four houses had fallen down much earlier and only site of the house is available. If the plaintiffs are residing at Ahmedabad it is difficult to believe that they were in actual possession of the open land. It has not been stated in what manner they remained in possession. It has come in evidence that there is one temple over the land. It was also tried to be established that plaintiffs collected rent, but no counter foil of rent receipt was filed. No person from whom the rent was collected was examined by the plaintiffs - respondents. The report of the Commissioner also shows that the plaintiff could not be in possession over the land in suit. They are unaware of the correct boundaries of the land in Suit so also its location. The boundary given in the plaint initially did not tally with the spot position. After close of evidence and cross examination of the defendant, request was made from the side of the defendant for issuing commission. The report of the Commissioner described the land in suit in totally different manner. It was then that the plaint was got amended by the plaintiff to provide correct position of the land in Suit and relief of possession was also subsequently added. It is true that the amendment which was allowed by the trial Court for clarification of boundary cannot be challenged now in Second Appeal and the amendment was rightly allowed as was held by the Supreme Court in C.M. Vereekutty V/s. C.M. Mathukutty,

reported in 1981 SC 1533. However, a person not knowing the exact location of the land in Suit can hardly be said to have been in actual possession of the land in dispute.

18. Even if from the Partition Deed title of the plaintiffs over the so called disputed land is accepted, the next question is whether the defendants have succeeded in establishing their possession over the same for more than 20 years and have perfected title by adverse possession. If they had succeeded in establishing these points naturally plaintiffs will be non-suited.

19. The Lower Appellate Court from the evidence on record found that the defendants' possession since 1934 is established. In the alternative it found that in any case the defendants' possession since 1941 is established. Adding a period of 12 years to 1941, defendants adverse possession completed in the year 1953. The Suit was filed in the year 1968 and as such in view of Article 65 of the Limitation Act the Suit was barred by limitation.

20. On plea of long possession the findings of the lower Appellate Court based on proper appreciation of evidence on record requires no interference in this Second Appeal. The continuous possession of the defendants for more than 20 years openly and without obstruction by the husband of the plaintiff No.1 and also by the plaintiffs will perfect title of the defendants by adverse possession. It is a case where the appellants claim disclaimer of title of the plaintiffs. They filed documents to show that they were in possession. Situation of the land in suit is such that the surrounding land having much larger area is still in possession of the defendants. At no point of time the husband of plaintiff No.1 and father of remaining plaintiffs obstructed the defendants' user of the land in Suit which was open land. Likewise the plaintiffs also did not object to the using of the land in suit by the defendants. The consideration that the plaintiff No.1 is poor widow is no consideration to reverse the finding on adverse possession recorded by the lower Appellate Court. The defendants were using the property for various purposes of the community. Consequently they could not have asserted in what manner each member of Nayak community had used the land in Suit. The findings of the lower Appellate Court on adverse possession, to my mind, also require no interference.

21. Few cases were cited by the learned Counsel for

the respondents on the plea of adverse possession and it was urged that this plea is not sustainable. In *Naunihal Singh V/s. Alice Gorgina Skinner & anr.*, reported in A.I.R. 1925 All. 707, the facts were all-together different. It was held that no adverse possession can run against a person till he becomes entitled to the possession of the property. It was further held that adverse possession for any length of time against the tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. On the basis of this pronouncement the respondent's contention that the adverse possession and limitation is to be counted from the date of partition, cannot be accepted, nor this case helps the respondents in any other manner.

22. The case of *Dr. Mahesh Chand Sharma V/s. Raj Kumar Sharma (Smt) and others*, reported in (1996) 8 SCC 128 is also distinguishable on facts. In the first place in this case neither in the trial Court nor in the first Appellate Court the plea of limitation was pressed. It was only agitated before the Apex Court and the Apex Court observed that since this plea was not agitated in the two Courts below the defendants can not say that the suit is barred by limitation and adverse possession. In the alternative the Apex Court held that on the facts of the case the plea of adverse possession was not tenable. The case of *Basa and others v/s. Khairunnessa Bivi and another*, reported in (1994) 6 SCC 155 also does not help the respondents, because in this case also the facts were different. Ancestral property was partitioned between the second plaintiff and his brother. Thereafter they remained in possession and enjoyment of their respective shares. Subsequently a gift was made by the second plaintiff of a portion of his share in favour of the first plaintiff. After 16 years of continuous possession when the defendants - appellants attempted to tres-pass in to the property of second plaintiff, the suit for declaration of title and possession was filed by the plaintiff. The defendants disputed title of the 2nd plaintiff and raised the plea of adverse possession. It was held by the Apex Court that 2nd plaintiff being in uninterrupted possession and enjoyment for 16 years in assertion to his own right as owner acquired possessory title and as such was entitled to declaration of title. Thus, in this case on facts it was found that the plaintiff was in continuous and uninterrupted possession for 16 years in assertion of his right as owner. Consequently it was held that the plaintiff has acquired possessory title and was consequently entitled to his possession and declaration of title. In this case such



continuous possession is not established by the plaintiffs respondents and they can not take advantage of this case.

The last case reported in A.I.R. 1978 All. 555 does not help the respondents. In this case it was laid down that where a suit was filed on the basis of title and the plaintiff had succeeded in proving her title, the plaintiff could be denied the relief of possession only if the defendant succeeded in showing that he was in adverse possession of the property in dispute for more than 12 years. The plaintiff could not be non-suited if she failed to prove her possession over the property in dispute within 12 years of the date of institution of the Suit.

23. Applying this verdict to the facts of the case it can be said that since the defendants had succeeded in establishing the plea of adverse possession they can certainly non-suit the plaintiff.

Other observation of this case also does not help the respondents. Simply because the plaintiff No.1 is widow it cannot be said that the plea of adverse possession raised by the defendants can be rejected.

24. In the result I find that the lower Appellate Court did not commit any illegality in deciding the three issues remitted to it in the manner it has been decided by the lower Appellate Court. There is no merit in the contention that the finding on remitted issues requires interference. As a consequence thereof it becomes meaningless to discuss that the lower Appellate Court should have remanded the Suit to the trial Court for decision on Issue Nos.2, 4 & 5. These issues have now been answered by the lower Appellate Court under the direction of this Court.

25. Since the Suit is barred by adverse possession and limitation it could not be decreed by the lower Appellate Court. The Appeal, therefore, succeeds and is hereby allowed. The Judgment and Decree of the lower Appellate Court dated 27.3.1978 are set aside whereas the Judgment and Decree of the trial Court dated 10.11.1975 are restored and the Suit is dismissed. In the circumstances of the case the parties shall bear their own cost of this Appeal.

\* \* \* \* \*

Sd/-

\*sas\*